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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

APR 2 1997

Federal Communications Commission
Office of Secretary

WT Docket No. 96-148

GN Docket No. 96-113

In the Matter of)

Geographic Partitioning and Spectrum)
Disaggregation by Commercial Mobile)
Radio Service Licensees)

Implementation of Section 257 of the)
Communications Act - Elimination)
of Market Entry Barriers)

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

U S WEST, Inc. ("U S WEST") hereby submits this Opposition to the
Petition for Reconsideration of the Commission's *Report and Order and Further Notice
of Proposed Rulemaking*¹ filed by the National Telephone Cooperative Association and
the Independent Alliance ("NTCA/IA" or "Petitioners").² U S WEST, through its
subsidiary U S WEST Communications, Inc., is the winning bidder for 53 D and E Block

¹ *In the Matter of Geographic Partitioning and Spectrum Disaggregation by
Commercial Mobile Radio Service Licensees; Implementation of Section 257 of
the Communications Act — Elimination of Market Entry Barriers, Report and
Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-148, GN
Docket No. 96-113, FCC 96-474 (released December 20, 1996) ("Report and
Order"). As discussed herein, by this filing U S WEST also submits brief
comments in support of the Omnipoint Petition for Reconsideration filed in this
docket. See discussion *infra* at 3-4.

² Petition for Reconsideration of the National Telephone Cooperative Association
and the Independent Alliance, filed February 5, 1997 (the "Petition").

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broadband PCS licenses. The Petition raises no facts which have not previously been presented to the Commission and must be denied.³

NTCA/IA contend that the *Report and Order* contravenes the Commission's statutory mandates under Section 309(j) of the Communications Act, 47 U.S.C. § 309(j).⁴ NTCA/IA further maintain that the Commission should either reinstate the rules that reserved partitioning to rural telephone companies or, in the alternative, adopt the "right of first refusal" proposal that Petitioners advocated in the above-referenced proceeding.⁵

Petitioners' arguments are virtually identical to those advocated by the Rural Telecommunications Group ("RTG") before United States Court of Appeals for the District of Columbia Circuit ("Court"). In that case, RTG submitted an Emergency Motion for Stay of the *Report and Order* which, like the NTCA/IA Petition, argued that the Commission violated its Section 309(j) mandate and arbitrarily amended the partitioning rules. U S WEST intervened in that case and, jointly with Sprint PCS, L.P., opposed RTG's Motion for Stay. By Order released March 6, 1997, the Court denied RTG's Motion for Stay, finding that the requirements for a stay had not been satisfied.⁶

Because the arguments raised by Petitioners mirror the arguments addressed in the stay request filed with the Court, U S WEST incorporates herein by

³ See 47 C.F.R. § 1.429(b).

⁴ Petition at 3-6.

⁵ *Id.* at 9-10 (citing NTCA Comments filed in WT Docket No. 96-148).

⁶ *Rural Telecommunications Group v. FCC*, Order Denying Emergency Motion for Stay, Case No. 97-1077 (D.C. Cir. issued March 6, 1997).

reference the Joint Opposition submitted to the Court on March 4, 1997.⁷ As demonstrated therein, the Commission's new partitioning rules fully comply with Congress' Section 309(j) mandates.⁸ The Commission also clearly explained the reasons for rejecting the "right of first refusal" proposal.⁹ For the reasons stated therein, the NTCA/IA Petition should be denied.

Finally, U S WEST takes this opportunity to register its support for both portions of Omnipoint's Petition for Reconsideration. First, U S WEST supports Omnipoint's request that Block F licensees be authorized to "swap" their license for either the Block D or E license in the same BTA.¹⁰ U S WEST agrees with Omnipoint that this proposal would impose minimal administrative burdens while promoting important public interest benefits, notably by diminishing potential adjacent channel interference problems for broadband PCS providers.

Second, U S WEST supports Omnipoint's request that the Commission eliminate its application requirement that partitioning parties disclose and file the underlying contracts and agreements between them.¹¹ The Commission's current rules

⁷ For ease of reference, a copy of the U S WEST-Sprint Joint Opposition is attached.

⁸ U S WEST, Inc. and Sprint Spectrum L.P., Joint Opposition to Motion for Stay, D.C. Cir. Case No. 97-1077, filed March 4, 1997, at 4-12.

⁹ *Id.* at 12 (citing *Report and Order* ¶¶ 14-18).

¹⁰ Petition for Reconsideration of Omnipoint Corporation, WT Docket No. 96-148, filed February 5, 1997, at 2-5.

¹¹ *Id.* at 5-7 (citing 47 C.F.R. § 1.2111(a)).

fully address unjust enrichment concerns.¹² Furthermore, in the case of the Block A, B, D and E licenses, no such concerns are present because licensees paid market value for their licenses. U S WEST further agrees with Omnipoint that the disclosure requirements unduly burden the parties involved in partitioning arrangements, and compromise legitimate business and proprietary interests with no corresponding public benefit.

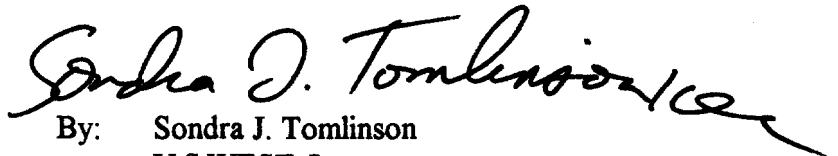
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¹² See 47 C.F.R. §§ 24.716(d), 24.717(c).

For the reasons discussed herein, U S WEST respectfully requests that the Commission deny the NTCA/IA Petition, and grant Omnipoint's Petition for Reconsideration.

Respectfully submitted,

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April 2, 1997

ATTACHMENT

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioner,

v.

Case No. 97-1077

**Federal Communications Commission and
United States of America,**

Respondents.

OPPOSITION TO MOTION FOR STAY

U S WEST, Inc. ("U S WEST"),¹ and Sprint Spectrum, L.P. d/b/a Sprint PCS ("Sprint PCS")² (collectively, "Joint Stay Opponents"), pursuant to D.C. Cir. Rule 27, hereby jointly oppose the Emergency Motion for Stay ("Motion") filed by the Rural Telecommunications Group ("RTG" or "Petitioners") on February 27, 1997. RTG sought a stay of a rulemaking decision of the Federal Communications Commission ("FCC" or "Commission"), *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees*, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-474 (released Dec. 20, 1996) ("*Report and Order*"), which liberalizes eligibility requirements for partitioned broadband Personal

¹ U S WEST, through its subsidiary U S WEST Communications, Inc., is the winning bidder for 53 broadband PCS licenses in the Commission's D, E and F Block auction. U S WEST is also a party to a partnership with Bell Atlantic, NYNEX and AirTouch Communications which provides broadband PCS service in various U.S. markets. U S WEST was an active participant below and thus would be directly affected by a decision in this proceeding. U S WEST has moved for leave to intervene in the instant case.

2 Sprint PCS will offer broadband PCS services through WirelessCo., L.P. and PhillieCo, L.P. Directly or through its affiliates, Sprint PCS will offer broadband PCS services nationwide. Sprint PCS was an active participant below and would be directly affected by a decision in this proceeding. Sprint PCS has moved for leave to intervene in the instant case.

Communications Services ("PCS") licenses and provides new opportunities to disaggregate spectrum. As demonstrated herein, RTG fails to meet the requirements for grant of extraordinary relief, and its Motion should therefore be denied.

BACKGROUND

In 1994, the FCC adopted a series of decisions establishing rules for the new broadband Personal Communications Service. Among the rules adopted was one establishing the criteria for when a licensee would be permitted to split or "partition" the geographic area for which it is licensed. This rule permits the area to be subdivided, with two or more parties holding geographically separated licenses on the same frequency band as the original licensee. In authorizing partitioning, the Commission followed procedures similar to those used for partitioning the geographic service areas covered by cellular licensees — but imposed additional limits on such partitioning. The rules and policies adopted in 1994, 47 C.F.R. § 24.714 (1995), differed from the cellular partitioning rules in several respects. In particular, for PCS the Commission initially decided to allow partitioning only when the party acquiring a partitioned area is a rural telephone company ("rural telco"), in order to promote the participation of rural telcos in PCS. *See generally Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, GN Docket 93-253, *Fifth Report and Order*, 9 F.C.C.R. 5532, 5597-5599 (1994) (*Fifth R&O*).

The Commission later requested comment on whether to extend geographic partitioning of broadband PCS licenses to women- and minority-owned businesses, stating that the record in the *Fifth Report and Order* "[had] not been sufficiently developed on the issue of whether the public interest would be served by permitting businesses owned by minorities and/or women to hold partitioned licenses." *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, GN Docket 93-253, *Further Notice of Proposed Rulemaking*, 9 F.C.C.R. 6775, 6775

(1994). Subsequently, the Commission began another rulemaking in which it proposed to broaden the availability of partitioning in PCS, as well as to permit the splitting-up or disaggregation of the spectrum blocks assigned to PCS licenses. In July 1996, the Commission issued a *Notice of Proposed Rulemaking* that proposed, among other rule liberalizations, elimination of the rural telco limitation on eligibility for partitioning. *Geographic Partitioning and Spectrum Disaggregation*, WT Docket 96-148, *Notice of Proposed Rulemaking*, 11 F.C.C.R. 10187 (1996).

In December 1996, the Commission issued the order under review, in which it adopted rules granting PCS licensees greater flexibility to partition their licenses. Under the revised rules, there are no significant limits on the geographical areas that could be partitioned, and there were no limitations on who could hold the license for a partitioned area, provided the proposed partitioned licensee is qualified to hold a license. *Report and Order* ¶¶ 6-24.

Rural telcos remain fully eligible to hold partitioned licenses. In fact, the elimination of preestablished geographical boundaries for partitioning permits licenses to be partitioned, if the parties so agree, along geographical boundaries reflecting rural telcos' wireline service areas or larger or smaller areas. Under the former rules, partitioning was only permitted along "established geopolitical boundaries (such as county lines)" that included the rural telco's wireline service area and the area thus established was required to be reasonably related to the rural telco's service area. 47 C.F.R. § 24.714(d) (1995). The Commission found that these limitations could make it difficult to partition service areas for any entities — including rural telcos — in some cases and determined to change the rules. By increasing the flexibility of partitioning, the Commission found, rural telcos may have additional opportunities to obtain partitioned licenses. *See Report and Order* ¶¶ 20-23.

The Commission found that broadening eligibility for partitioning was in the public interest because it would provide the public with more potential sources of PCS service, while still giving rural telcos the opportunity to hold partitioned PCS licenses. *Id.* ¶¶ 13-18. Moreover, by eliminating

the *exclusive* eligibility of rural telcos to hold partitioned PCS licenses, the Commission found that it was able to provide PCS opportunities for small businesses — including rural telcos — consistent with the statutory objectives set by Congress. *Id.*

I. RTG HAS FAILED TO MEET THE REQUIREMENTS FOR A STAY

A party seeking stay of a Commission decision must meet the four-pronged test articulated by this Court in *Virginia Petroleum Jobber's Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). RTG must show (1) a strong likelihood of prevailing on the merits; (2) irreparable harm if the stay is not granted; (3) the absence of harm to others if the stay is granted; and (4) that the public interest will be served if the stay is granted. RTG fails to satisfy each of these requirements.

A. RTG Has Shown No Likelihood of Success on the Merits

RTG contends that the *Report and Order* contravenes Sections 309(j)(3) and (j)(4) of the Communications Act, 47 U.S.C. § 309(j)(3) and (4). (Motion at 3.) RTG contends further that the *Report and Order* ignores prior Commission findings of law and fact, and is unlawful and arbitrary and capricious. (Motion at 3.) As demonstrated herein, however, the Commission has complied with the statute and has issued a reasoned decision supported by the record.

1. The Commission Has Fully Complied with the Statutory Objectives of Section 309(j) of the Communications Act

Section 309(j) of the Communications Act authorizes the Commission to allocate spectrum through competitive bidding. Congress asked the Commission, in designing competitive bidding methodologies, to “seek to promote” a number of objectives, including:

- The development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

- The promotion of economic opportunity and competition and ensuring that new and innovating technologies are readily accessible to the American people by avoiding excessive concentration of licenses and *by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women*; and
- Efficient and intensive use of the electromagnetic spectrum.

47 U.S.C. § 309(j)(3) (emphasis added). In prescribing regulations to meet these objectives,

Congress further directed the Commission to take certain measures, including:

- Consistent with the public interest, convenience, and necessity, the purposes of the Communications Act, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) *economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women*, and (iii) investment in and rapid deployment of new technologies and services; and
- ensure that *small businesses, rural telephone companies, and businesses owned by members of minority groups and women* are given the *opportunity to participate* in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures.

Id. § 309(j)(4) (emphasis added). Importantly, Congress left to the Commission's discretion how best to ensure compliance with these objectives. See *In the Matter of Deferral of Licensing of MTA Commercial Broadband PCS*, Memorandum Opinion and Order, 11 F.C.C.R. 17052, 17058-17059 (1996) (stating that Commission must balance objectives of Section 309(j)).

This Court's *Omnipoint* decision has already recognized the discretion afforded the Commission in complying with its Section 309(j)(3) and (j)(4) mandates. *Omnipoint Corp. v. FCC*, 78 F.3d 620, 635-36 (D.C. Cir. 1996). In *Omnipoint*, as here, the Court was confronted with a Commission decision to expand eligibility for auction- and license-related benefits, and to modify the parameters of those benefits. As the Court noted there, the Commission "leveled all benefits upward, thereby making available to *all* small businesses the favorable terms that previously had

been available only to small businesses owned by women and minorities.” *Id.* at 627 (emphasis added). The Court found that modification of the rules at issue in *Omnipoint* “aid[ed] participation by small businesses in the C block auction by providing an additional means for small businesses to meet their financial needs,” and it was “entirely reasonable . . . to extend an additional advantage to more companies that qualified to bid in the entrepreneurs’ blocks.” *Id.* at 636. Similarly, here, the Commission found that its expansion of partitioning opportunities in the *Report and Order* RTG seeks to stay would enable “[s]maller or newly-formed entities” to enter the PCS market “at a cost that is proportionately less than that of the full geographic market,” *Report and Order* ¶ 13, thus promoting Section 309(j) objectives. As recognized in *Omnipoint*, Section 309(j) clearly does not mandate that the Commission afford a particular entity — be it a small business, woman- or minority-owned business, or rural telco — exclusive access to a particular auction- or licensing-related benefit. *See Omnipoint*, 78 F.3d at 633.

RTG contends that the *Report and Order* “denies rural telephone companies a previously afforded opportunity to participate in PCS and delays the provision of PCS to rural America” in contravention of Section 309(j)(3) and 309(j)(4). (Motion at 3.) RTG states further that the Commission’s statutory obligation to rural telcos is “independent of the Commission’s similar obligation to other ‘designated entities’” and applies to “*all rural telephone companies*, not just those meeting additional size criteria.” (Motion at 4, 9 (emphasis in original)). These statements are simply incorrect.

RTG has misstated the effect of the *Report and Order* and has misapplied the Congressional directive of Section 309(j). Rural telcos remain eligible for partitioned licenses under the *Report and Order* and there has been no showing that the provision of PCS to rural America will in any way be negatively impacted. Indeed, the partitioning opportunities for rural telephone companies and others to provide PCS service are increased; in turn, the provision of PCS service to rural America

will be enhanced, not harmed, by the *Report and Order*. As noted, Congress specifically did *not* set aside or require the allocation of licenses for any particular class of entities. Rather, it sought only to ensure that economic opportunities were made available so that a variety of groups, *including* rural telcos, could participate in the competitive bidding process. As to RTG's argument that Congress intended that rural telcos receive special treatment vis-à-vis other "designated entities," (Motion at 4, *citing* H.R. Conf. Rep. No. 103-213 at 484 (1993)) the provision of the 1993 Conference Report RTG cites indicates merely an intent to add rural telcos to the list of entities for the Commission to consider when drafting its regulations — an interpretation confirmed by a plain reading of the statute. Indeed, Congress gave the Commission explicit instructions *not* to construe the Act to predetermine the outcome of PCS licensing. H.R. Rep. No. 103-111, at 256-57 (1993).

Further, the Commission has taken numerous measures to promote rural telco participation in PCS. In compliance with Section 309(j)(3)(A) and (B) and (j)(4)(C) and (D), the Commission established PCS frequency blocks of varying sizes and service areas to ensure that entities with limited capital resources could participate in PCS. As the Commission noted, "by licensing some blocks on a BTA basis, we comply with Congress' directive that we prescribe area designations that promote economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." *See New Personal Communications Services*, GN Docket 90-314, *Memorandum Opinion and Order*, 9 F.C.C.R. 4957, 4988 (1994) (subsequent history omitted) (*PCS Reconsideration Order*). Similarly, in compliance with Section 309(j)(4)(B), the Commission adopted less stringent construction requirements for 10 MHz BTA licensees to "increase the viability and value of some broadband licenses, especially those in less densely populated service areas." *See id.* at 5019. Not only are rural telcos eligible for partitioned licenses, but entire classes of PCS licenses — the "C" and "F" Blocks — were reserved for entities with limited capital resources, with bidding credits and

installment payment options made available for C and F Block bidders with even more limited resources. *See* 47 C.F.R. §§ 24.709-24.720 (1996); *see also Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, GN Docket 93-253, *Sixth Report and Order*, 11 F.C.C.R. 136, 146-150, 156-161 (1995) (extending auction-related benefits to all potential C Block bidders).

As the Commission noted, a number of rural telcos were eligible to participate in the C and F Block auction and to utilize bidding credits and installment payments under these rules. *Fifth Report and Order*, 9 F.C.C.R. at 5599. These bidding preferences provided additional opportunities for small businesses — including rural telcos — to participate in broadband PCS auctions and to provide PCS to rural areas. Also, as many rural telcos qualify as entrepreneurs or small businesses, they remain eligible to acquire C and F block licenses under the Commission's transfer of control rules. *See* 47 C.F.R. § 24.839(d) (1996); *Omnipoint*, 78 F.3d at 634 (stating that the fact that modified rules "will incidentally benefit" a class of bidders supports the Commission's compliance with Section 309(j)(4)(D) mandate).

RTG's claim that the Commission's decision will deny the introduction of PCS to rural America in violation of Section 309(j) because "[a]bsent the exclusive partitioning rule, or geographic-based performance requirements, there is *no* incentive for a PCS licensee to provide service to or partition its license to someone seeking to serve a small, rural area" (Motion at 11, emphasis in original) also has no basis. RTG does not explain why PCS licensees will no longer want to enter into arrangements whereby rural telcos can provide service to high-cost rural areas. The economic factors which have encouraged such arrangements to date remain a strong motivation favoring such arrangements now and in the future. As petitioners themselves have noted:

[B]y virtue of their existing wireline facilities (*e.g.*, towers, poles, conduits, switches and personnel), rural telephone companies are in the best position to rapidly provide PCS to rural areas. . . . Entities

other than rural telephone companies face a tremendous financial burden if they wish to build the infrastructure necessary to reach low-density population areas and persons situated in remote and/or rugged terrain or harsh climates.

(Motion at 10.)

Nothing in the *Report and Order* alters this fundamental economic reality, and rural telephone companies will continue to have considerable built-in advantages over other potential partitionees. For example, the Joint Stay Opponents are involved in a number of negotiations to partition licenses to rural telcos and others and they fully intend to pursue such arrangements to successful completion. Such arrangements make good economic sense in certain cases and are no less attractive in light of the liberalized eligibility rules. Because rural telco wireline service areas do not necessarily conform to established geopolitical boundaries, partitioning in many cases might not have been feasible under the old rules — for example, a rural telco may be unable to afford construction of a system conforming to much larger geographical boundaries than its service area, or the minimum partitionable area contains multiple rural telcos. The flexibility granted by the new rules would permit a rural telco to negotiate for a partitioned license covering any agreed-upon area.

In addition, RTG simply ignores the impact of the Commission's broadband PCS buildout requirements on promoting PCS deployment to rural areas. A, B and C Block licensees must have the capability to serve at least one-third of the population in their service area within the first five years of the license term, and two-thirds within ten years of being licensed.³ D, E and F Block licensees must have the capability of serving one-quarter of the population in their licensed area within five years of being licensed, or make a showing of substantial service in their licensed area

³ 47 C.F.R. § 24.203(a) (1996). Broadband PCS licensees in the "A" and "B" blocks are licensed to use 30 MHZ of spectrum to serve a so-called "Major Trading Area," or "MTA." *Id.* § 24.229(a). "C" Block licensees are licensed to use 30 MHZ of spectrum to serve a smaller "Basic Trading Area" or "BTA." *Id.* § 24.229(b). *See generally id.* § 24.202 (MTAs and BTAs are defined based on Rand McNally's 1992 *Commercial Atlas & Marketing Guide*).

within the first five years of license term. 47 C.F.R. § 24.203(a) (1996). Many BTA licensees serve primarily rural areas, and PCS licensees in those areas cannot escape serving rural areas in order to complete the compliance deadlines.⁴ These requirements are perfectly consistent with the Commission's mandate under Section 309(j)(4)(B) and help ensure that rural telcos have opportunities to acquire PCS spectrum.

RTG also understates the competitive impact of PCS on service in rural areas. In addition to actual PCS cell site construction in rural areas, PCS providers will spur incumbent cellular carriers operating in rural areas to upgrade their systems to facilitate new digital technologies, thus also promoting the deployment of new technologies to rural areas. Accordingly, the Commission properly found that the public interest would be served by creating the most opportunities for partitioning.

Further, the effect of liberalizing eligibility for partitioned licenses will be simply that additional parties may provide PCS service to rural areas — this does not entail the denial of PCS service to rural America, but in fact promotes greater and more competitive services to such areas.⁵ As the Commission duly noted in the *Report and Order* "Congress did not dictate that [the original

⁴ Under the former rules, rural telcos were subject to the *same* construction requirements as the original licensee. 47 C.F.R. § 24.714(e) (1995). RTG has submitted no evidence that rural telcos, as the only entities eligible for partitioned licenses, would necessarily provide service "above and beyond" that required under the current rules.

⁵ See *Report and Order* ¶¶ 13-14. In the proceeding below, RTG itself supported a proposal that would have given rural telcos a "right of first refusal" on partitioned licenses. See *id.* ¶ 17, n.63. Under this proposal, non-rural telcos would be eligible for partitioned licenses, but only after the rural telco serving that market was given the opportunity to obtain the partitioned area. While this proposal would have given rural telcos preferential regulatory treatment, it clearly would have allowed for non-rural telco provision of broadband PCS in partitioned areas and therefore contradicts RTG's argument that non-rural telcos are incapable of providing PCS service to rural America.

partitioning rules] should be the sole method of ensuring the rapid deployment of service in rural areas.” *Report and Order* ¶ 15.

2. The *Report and Order* Is a Reasoned Decision in Accord with the Commission’s Statutory Mandate

The Commission is not required to “establish rules of conduct to last forever.” See *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983) (citing *American Trucking Assns., Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967), and *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)). If the Commission’s decision is reasoned — *i.e.*, the agency considered relevant facts and explained facts and policy concerns on which it relied and whether those facts have some basis in the record — it passes muster under the Administrative Procedure Act’s arbitrary and capricious standard.⁶ The *Report and Order* clearly meets this standard.

RTG contends, however, that the *Report and Order* is arbitrary and capricious because it “lacks reasoned justification for eliminating rural partitioning” and the Commission “fail[ed] to address, or find, that rural partitioning is unnecessary to ensure that rural telephone companies have an economic opportunity to provide PCS.” (Motion at 13.) RTG contends further that other provisions which rural telcos benefit from (or could have benefitted from, had they participated in the auctions) were insufficient to meet the Commission’s statutory mandate, as the capital costs associated with MTA and BTA service areas made auction participation prohibitively expensive. (*Id.* at 6, 13.)

⁶ 5 U.S.C. § 706(2)(A). See *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (review is deferential for decisions involving complex industry analyses and difficult policy choices); *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995) (review of policy determinations in which the agency is acknowledged to have expertise is particularly deferential).

Again, RTG misstates the effect of the *Report and Order*. Rural telcos remain eligible for partitioned licenses, and indeed, the availability of partitioning both inside and outside a rural telco's wireline service area, and with greater flexibility as to the service area configuration, helps to remedy capital barriers rural telcos may have faced during the auctions. *See Report and Order* ¶¶ 13, 23.

Further, RTG's claims that its members relied on the Commission's old partition rules, while a tacit admission of a business strategy gone awry, hardly demonstrates that the *Report and Order* is arbitrary and capricious. First, RTG contends that rural telcos opted to sit out the auction to seek the partitioning option, yet contradicts itself in the same paragraph, stating that rural telcos could not have afforded to participate in the broadband PCS auctions in the first place. (Motion at 6.) Many small businesses and rural telephone companies did, in fact, participate in the PCS auctions — of the 125 winning bidders in the D-E-F Block auction, 32 were rural telcos. *FCC Public Notice, D, E and F Block Auction Closes*, DA 97-81 (released Jan. 15, 1997), at 1. In addition, and importantly, broadband PCS licensees are not required to partition their licenses to rural telcos under either the current rules or the *Report and Order*. Relying solely on the post-auction aftermarket to obtain PCS license areas entailed risks that should have been apparent to RTG's members at the time of the auctions.

The Commission clearly stated the policy reasons for liberalizing the partitioning rules, including the removal of potential barriers to entry, efficient spectrum use, and the delivery of service to unserved and underserved areas. *Report and Order* ¶ 13. Further, the Commission expressly addressed — and rebutted — the arguments set forth in RTG's Motion, including the rejected "right of first refusal" proposal. *Id.* ¶¶ 14-18. Finally, as discussed above, the Commission's decision comports with the statutory requirements of Section 309(j). Simply put, there is no basis for legal challenge.

B. Rural Telcos Will Not Suffer Irreparable Harm if the Stay is Not Granted

RTG contends that denial of its stay request will "prejudice the issue of whether non-rural telephone companies are the best providers of PCS to rural America, and pre-judges that the court will determine that the Commission was within its authority to eliminate the exclusive rural telephone company partitioning right." (Motion at 21.) RTG argues further that RTG will be irreparably injured "by the Commission's likely inability to rescind operating authority granted to non-rural telephone companies who obtained partitioned licenses pursuant to the overturned order, so that rural telephone companies can assume their rightful partitioning privilege." (Motion at 22.)

The injury claimed as "irreparable" must be "both certain and great," and "bare allegations of what is likely to occur" are insufficient to establish irreparable harm. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Cable & Wireless Communications, Inc.*, 8 F.C.C.R. 2206, 2207 (Com. Car. Bur. 1993). As discussed above, rural telcos are not prohibited from obtaining licenses in the auction, from purchasing licenses from an auction winner, or from obtaining partitioned licenses. They have all the same opportunities to obtain licenses now that they had before (and even more, due to the elimination of the geopolitical boundary requirement). As to the argument that denial of RTG's stay motion will render it "too late for its members to negotiate for and obtain the licenses they would have acquired," RTG disregards the fact noted earlier that PCS licensees, under the old rules, as well as the *Report and Order*, are not required to partition their licenses to *anyone*, and RTG has submitted no evidence that its member rural telcos cannot continue to successfully pursue and acquire partitioned licenses in their service area.

At most, RTG's members might have had an expectation, under the old rural telco exclusivity rule, that they would eventually be able to negotiate some partitioning agreements without having to compete with other potential partitionees. The only "harm" that rural telcos will suffer as a result of the *Report and Order* is the possible inconvenience associated with having to

compete with other potential licensees for partitioned markets. It is well-settled that this type of economic or competitive harm is not sufficient to meet the Commission's and judiciary's standards for granting a stay.⁷ None of the "harm" that will purportedly befall RTG's members is sufficient to warrant grant of RTG's Motion.

Moreover, rural telcos will instead incur considerable benefits upon the effective date of the *Report and Order*. Under the old rules, rural telcos were eligible only for partitioned licenses related to their authorized wireline service areas. 47 C.F.R. § 24.714(d)(3) (1995). Under the *Report and Order*, rural telcos are eligible for partitioned licenses anywhere, of any geographic size. Similarly, PCS licensees have much greater flexibility in configuring market areas or spectrum amounts to benefit a much greater number of potential licensees, including rural telcos. This rule change, together with the *Report and Order* provisions for spectrum disaggregation, *see Report and Order* ¶¶ 44-46, will permit rural telcos to negotiate for partitioning arrangements that better suit their business plans and financial capabilities.

Also, the old rules imposed severe restrictions on the extent to which a rural telco, once it obtains a partitioned license, may transfer control of the license. Because rural telcos are eligible only for partitioned licenses related to their wireline service areas, rural telco partitionees seeking to sell portions of their PCS systems to others are, under the old rules, unable to transfer portions of their network to a party who values it most, but must instead transfer all or a substantial portion of their partitioned service area to a very limited or nonexistent pool of buyers — namely, other rural telcos (if there are any) whose service areas are within the partitioned area. By liberalizing the partitioning rules, the *Report and Order* will improve the marketability of PCS systems, and enable

⁷ See *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985); *Wisconsin Gas*, 758 F.2d at 674; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection between LECs and CMRS Providers*, CC Docket No. 96-98, CC Docket No. 95-185, *Order*, FCC 96-483 ¶¶ 9-10 (rel. Dec. 18, 1996).

all PCS operators — including rural telcos — to partition their networks to parties who value it most. Rural telcos, as the likely beneficiaries of partitioned licenses in rural areas, will benefit from this added flexibility.

Finally, RTG has not identified with specificity which of its members will be harmed, the precise nature of the harm, or even the geographic areas in which its members have wireline service areas where they have exclusivity rights regarding partitioning. RTG does not represent all rural telcos. It certainly has made no showing that a stay of the Commission's decision is necessary nationwide, even if its members were, *arguendo*, irreparably harmed in their respective wireline service areas.

C. Others Will Suffer Harm If the Stay Is Granted

RTG contends that grant of its stay request "will merely preserve the *status quo* and presents no harm to the public and other interested parties." (Motion at 18.) RTG is simply wrong on this point. Instead, a stay will negatively affect existing and prospective licensees and the public. Wireless customers, including those in rural areas, will be denied the benefits of additional competition and lower prices. Grant of the stay will reduce the business flexibility given PCS licensees to use or dispose of their spectrum and, in turn, will devalue broadband PCS spectrum. This, in turn, may also make it more difficult for smaller PCS licensees — particularly C and F block licensees — to obtain the financing necessary to successfully construct their systems. *See Report and Order ¶¶ 6, 13-16.*

Grant of a stay would also preclude other entities, including women, minorities, and other small businesses, from the opportunity to participate in the provision of PCS in geographically partitioned areas. In addition, for the reasons discussed above, rural telcos will actually be harmed by the requested stay. Moreover, there are as many as six broadband PCS licensees in each market.

Under the rules that RTG seeks to keep in place, none of the six licensees can partition their licenses to provide opportunities for any of these entities, other than the handful of rural telcos — if any — that meet the rule's criteria. Rural telcos' exclusive eligibility for partitioning may thus prevent⁸ the use of numerous blocks of spectrum for the provision of service to the public by new entrants. In sum, grant of the stay will preclude partitioning opportunities outside of rural areas, and will also reduce the opportunities within rural service areas, all to the detriment of the public and the provision of service.

D. The Public Interest Will Not Be Served If the Stay is Granted

RTG contends that because the *Report and Order* will “effect such a fundamental change in prevailing practice,” the rules should “await a final determination of validity.” (Motion at 18.) RTG further states that it “will be forced to expend additional resources opposing each and every [partitioning application] singularly, and the Commission will be obligated to process these applications.” (*Id.*) As discussed above, however, the rules clearly are consistent with, and indeed promote, the Commission's statutory mandates. RTG's additional contention that the *Report and Order* poses “a significant obstacle to the introduction of PCS to rural America” (*id.* at 9) must be rejected for the reasons discussed above. By contrast, the public interest objectives advanced by the *Report and Order* will go unfulfilled if the stay were imposed. Grant of the stay will delay the introduction of new service providers and new opportunities for small businesses and rural telcos alike, with no corresponding public interest benefits. Accordingly, the stay should be denied.

⁸ The Commission's rules do not permit a single entity to hold more than 45 MHz of CMRS spectrum in a geographic area. 47 C.F.R. § 20.6 (1996). Thus, even if a rural telco acquired partitioned spectrum up to this limit, 75 MHz held by other PCS licensees would remain unavailable for partitioning.

II. CONCLUSION

For the reasons discussed herein, RTG's Motion for Stay should be dismissed.

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March 4, 1997.

CERTIFICATE OF SERVICE

I, Jo-Ann Grayton, do hereby certify that I have, on this 2nd day of April, 1997, caused to be served by first class U.S. mail, postage prepaid, a copy of the foregoing Opposition to Petition for Reconsideration to the following:

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